

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.3208 OF 1994**

Vinod J. Agarwal,
Block No.9, Sankalp Building,
Plot No.35, Pushpa Park Road
No.2, Malad (East),
Bombay-400 097.

.... Petitioner

- Versus -

1. Chief Officer,
Mira-Bhayander Municipal
Council, Bhayander,
Dist: Thane.

2. The Municipal Council,
Mira-Bhayander,
Dist: Thane.

3. The Collector,
Dist: Thane.

.... Respondents

Shri S.P. Kanuga for the Petitioner.

Shri R.S. Apte for the Respondent Nos.1 & 2.

CORAM: R.M.S. KHANDEPARKAR &
Mrs. ROSHAN DALVI, JJ.

DATED: MARCH 16, 2006

ORAL JUDGMENT (Per R.M.S. Khandeparkar, J.):

1. Heard the learned Advocate for the petitioner and the respondent Nos.1 and 2. None present for the respondent No.3, though served.

2. By the present petition, the petitioner is seeking relief in the nature of declaration that the order of forfeiture of the earnest money passed by the

respondent-council on 9-6-1994 under the letter of the same date is null and void and further for consequential relief in the nature of writ of mandamus for direction to the respondents to refund the said amount of the earnest money to the tune of Rs.1,00,000/-, with interest thereon at the rate of 18% per annum.

3. The undisputed facts relevant for the decision are, that the respondent-council invited offer for the appointment of an agent for collection of the octroi duty by publication of a Notice in the daily "Loksatta" dated 25-4-1994, for a period from 1-6-1994 to 31-5-1995. The last date for filing the sealed covers for the offer of appointment as an agent for the octroi collection was 9-5-1994 and accordingly the petitioner along with some other interested parties filed their forms of offer. The date fixed for opening of the tenders was 11-5-1994 while the validity of the tender was upto 16-5-1994. The tenders were not opened on 11-5-1994 neither on 16-5-1994 and the date for opening of the tenders was postponed to 21-5-1994. Considering the postponement of the date for opening of the tenders, the petitioner, by letter dated 18-5-1994, informed the respondent-council that the petitioner was no more interested in continuing to keep his offer alive and therefore withdrew the offer and demanded for refund of the earnest money. The tenders were opened by the

respondent-council on 21-5-1994 and the petitioner was found to be the highest offerer and accordingly the petitioner was informed by the respondents by its letter dated 23-5-1994 that his offer had been accepted. The petitioner informed the respondents on 27-5-1994 that under his letter dated 18-5-1994 he had already withdrawn his offer and therefore there was no question of his offer being accepted by the respondents. The respondents, however, by order dated 9-6-1994 forfeited the earnest money on the ground that inspite of acceptance of his offer, the petitioner had refused to enter into an agreement for collection of the octroi duty.

4. It is pertinent to note that in para 4 of the petition, the petitioner has specifically stated that:

"The Petitioner therefore by his letter dated 18th June 1994 informed the Respondent No.1 that the Petitioner withdraws the offer given in the tender submitted by the Petitioner and further requested to refund the earnest money deposited by the Petitioner with the Respondents. The Petitioner states that the said letter was duly received and acknowledged by the Respondent on 20th

June 1994 at 1.45 p.m."

There is no counter filed to this specific averment by the petitioner in the petition. Being so, it is to be presumed that the respondents were duly informed by the petitioner that his offer was withdrawn under the letter dated 18-6-1994.

5. While assailing the impugned order, drawing our attention to the decision of the learned single Judge in **Omprakash and Company, Bombay v. City and Industrial Development Corporation of Maharashtra Ltd., and another**, reported in 1993 Mah.L.J. 1419 and of the Apex Court in **National Highways Authority of India v. Ganga Enterprises and another**, reported in (2003) 7 SCC 410, the learned Advocate appearing for the petitioner submitted that considering the provision of law contained in Section 5 of the Indian Contract Act, the tender having been withdrawn before acceptance thereof, the respondents could not have proceeded to forfeit the earnest money in the absence of any specific condition attached to the tender document that the offerers were not entitled to withdraw the offer, and that too, even after the expiry of the validity period of the offer.

6. Undisputed facts of the case reveal that the tenders were to be opened on 11-5-1994 but they were not opened

till 21-5-1994. It is also undisputed fact that the validity period for the bid was upto 16-5-1994. It is nobody's case that the respondents had requested the persons who had submitted their offer to extend the validity of their offer beyond 16-5-1994. It is also a matter of record that the petitioner, on the ground that the opening of the tenders was postponed beyond 11-5-1994, had withdrawn his offer under the letter dated 18-5-1994 and the letter was duly received by the respondents on 20-5-1994. In the background of these facts, there was no occasion for the respondents to open and/or accept the alleged offer by the petitioner on 21-5-1994. The offer of the petitioner having been specifically withdrawn under the letter dated 18-5-1994 and communicated to the respondents on 20-5-1994, prior to the date of opening of the tenders, it was but natural that the respondents ought to have ignored the tender submitted by the petitioner and even if it was opened, it could not have been accepted, as on 21-5-1994 the offer of the petitioner was not subsisting. The law on the point of withdrawal of offer is very clear in view of the provision of law comprised under Section 5 of the Indian Contract Act. Once it is not in dispute that the alleged acceptance of the tender was on 21-5-1994 and the petitioner having chosen to withdraw the offer much prior to the said day, there was no subsisting offer on behalf of the petitioner on

21-5-1994.

7. As regards the earnest money, it is undisputed fact that the terms and conditions regarding the tender did not contain any term to the effect that the offerer would not be entitled for refund of the earnest money in case of withdrawal of the offer and certainly not in case of withdrawal of the offer beyond the period of validity of the bid. Once it is not in dispute that the period for the bid had expired on 16-5-1994 and thereafter, but before the date of opening of the tenders, the offer was withdrawn by the petitioner, in the absence of any condition to the contrary in relation to the earnest money, the same was liable to be refunded to the petitioner.

8. The petitioner, in that regard, is justified in placing reliance in the decision of the Apex Court in the matter of **National Highways Authority of India** (supra) as well as of the learned single Judge of this Court in **Omprakash and Company** (supra). In **National Highways Authority of India's** case, the bid security of Rs.50/- lakhs was not in relation to the performance of the contract but was given to ensure that the bidder would not withdraw the bid during the period of the bid validity and/or after the acceptance of the bid and on agreement being signed. Referring to the provisions of

the Indian Contract Act, which merely provide that a person can withdraw his offer before the acceptance of his offer, and noting that withdrawal of an offer before its acceptance is completely a different aspect from the forfeiture of the earnest/security money given for a particular purpose, the Apex Court had observed that, a person may have right to withdraw his offer but if he had made his offer on condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he cannot have right to claim that the earnest/security amount be returned to him. Undisputedly, that is not the case in the matter in hand. There was no such condition attached to the earnest money which was deposited along with the offer by the petitioner. Being so, once the offer was withdrawn before the acceptance of the tender and that too, after the expiry of the validity period for the bid, certainly the petitioner is justified in contending that the petitioner would be entitled for refund of the earnest money.

9. The petitioner also claims interest at the rate of 18% per annum on the earnest money. Question of grant of interest at the rate of 18% per annum on the said amount does not arise at all. Nothing is placed before us which could justify such a high rate of interest on

refund of the said amount. Taking into consideration the prevailing rate of interest, in our considered opinion, the flat rate of 5% per annum would be the appropriate rate of interest on the said amount.

10. In the result, therefore, the petition succeeds. The impugned order dated 9-6-1994, passed by the respondents, is hereby quashed and set aside and the respondents are directed to refund the earnest money of the petitioner to the tune of Rs.1,00,000/- along with interest thereon at the flat rate of 5% per annum with effect from 21-5-1994 till the date of the payment of the entire amount to the petitioner. The rule is made absolute accordingly with no order as to costs.

(Mrs. Roshan Dalvi, J.)

(R.M.S.Khandeparkar, J.)

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